

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

State of Utah, in the interest)	MEMORANDUM DECISION
of A.E, S.E., and K.E.,)	(Not For Official Publication)
persons under eighteen years)	
of age.)	Case No. 20070344-CA
_____)	
)	
D.B.,)	F I L E D
)	(June 21, 2007)
)	
Appellant,)	2007 UT App 219
)	
v.)	
)	
State of Utah,)	
)	
Appellee.)	

Third District Juvenile, Salt Lake Department, 152560
The Honorable Sharon P. McCully

Attorneys: Colleen K. Coebergh, Salt Lake City, for Appellant
Mark L. Shurtleff and John M. Peterson, Salt Lake
City, for Appellee
Martha Pierce and Mandy Rose, Salt Lake City,
Guardians Ad Litem

Before Judges Bench, Orme, and Thorne.

PER CURIAM:

D.B. (Mother) appeals the adjudication order insofar as it concluded that K.E. was abused by Mother and was within the jurisdiction of the court. D.B. is the mother of A.E., S.E., and K.E. When the petition was filed, Mother had custody of A.E. and S.E., but had relinquished custody of K.E. to the child's father when K.E. was six years old. At the time of adjudication, K.E. was fourteen years old. The State's petition named S.E. and A.E. in the caption and body as subjects of the petition, included case numbers for only those children, and prayed for relief only as to those children. The petition contained one factual allegation concerning Mother's contact with K.E. K.E. testified at the adjudication hearing. After the close of evidence, the juvenile court ordered the State to amend the petition to add K.E. and entered findings of fact in support of its conclusion that Mother emotionally abused K.E. The juvenile court concluded

that all three children were within its jurisdiction because A.E. and S.E. were neglected and K.E. was abused by Mother.

Mother contends that her due process rights were violated when the court ordered a post-trial amendment of the petition because she was not given notice and an opportunity to defend allegations that she abused K.E. The State claims that the petition was amended pursuant to rule 15(b) of the Utah Rules of Civil Procedure to conform to the evidence and that Mother implicitly consented to the amendment because although K.E. was not "specifically captioned in the petition, evidence regarding her mistreatment was presented at trial, was specifically alleged in the petition, and was not objected to by the mother at any time on any ground." The State, however, does not dispute that Mother objected to the amendment of the petition following the close of the evidence.

Utah Code section 78-3a-305(4) requires a child welfare petition to include "the name, age, and address, if any, of the minor upon whose behalf the petition is brought." Utah Code Ann. § 78-3a-305(4)(a) (Supp. 2006). The petition shall also contain "a concise statement of facts, separately stated, to support the conclusion that the minor upon whose behalf the petition is being brought is abused, neglected or dependent." Id. § 78-3a-305(4)(c). Rule 15(b) of the Utah Rules of Civil Procedure allows a post-trial amendment of the pleadings "to conform to the evidence" under circumstances where "issues not raised by the pleading are tried by express or implied consent of the parties." Utah R. Civ. P. 15(b). Rule 15(b) further provides:

If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the actions will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

Id.

The State cites and attempts to distinguish In re A.W., 2002 UT App 159, 48 P.3d 257. The petition in A.W. alleged that A.W. was "abused or neglected" by her parents. Id. at ¶1. At the conclusion of the trial, the juvenile court ruled that the State had not proved by clear and convincing evidence that A.W. was

abused or neglected, but it concluded "A.W. was dependent through no fault of the parents." Id. The State claimed that the pleadings were amended, through express or implied consent, to conform to the evidence, pursuant to rule 15(b) of the Utah Rules of Civil Procedure. We rejected that argument, stating:

The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues upon which the case was tried. The State did not allege in the petition that A.W. was dependent and the parties did not consent, either expressly or impliedly, to the amendment of the pleadings. The evidence presented at trial conforms only to the issues of neglect and abuse. Therefore, we conclude that the juvenile court exceeded its discretion in ruling that A.W. was a dependent child.

Id. at ¶3.

The petition in this case sought no relief regarding K.E., and no case number was assigned to her. While the petition sought removal of S.E. from Mother's custody and protective supervision over A.E., who would remain in Mother's custody, it sought no adjudication of abuse or neglect regarding K.E., who had not been in Mother's custody for several years. Mere mention of K.E. in the factual allegations was not sufficient to put Mother on notice to be prepared to defend against allegations of abuse regarding K.E. The State argues that Mother did not object to evidence regarding K.E. Mother contends that she believed the allegations regarding K.E. were made as further support for the cases regarding A.E. and S.E. We conclude that the amendment did not simply seek to conform to the evidence; it sought to add K.E. as a new subject of the petition after the trial.

We reverse the adjudication order insofar as it adjudicated K.E. to be abused by Mother and remand for a new adjudication hearing limited to issues raised by an amended petition alleging abuse of K.E. by Mother.

Russell W. Bench,
Presiding Judge

Gregory K. Orme, Judge

William A. Thorne Jr., Judge